

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GREGG E. DESCH)	
Claimant)	
)	
VS.)	
)	
MCELROY'S, INC.)	
Respondent)	Docket No. 1,014,638
)	
AND)	
)	
KANSAS BUILDING INDUSTRY)	
WORKERS COMPENSATION FUND)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the May 3, 2006 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board placed this matter on its summary docket and was deemed submitted on July 11, 2006.

APPEARANCES

Jan L. Fisher, of Topeka, Kansas, appeared for the claimant. Roy T. Artman, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the Award fails to list a supplemental report issued by Dr. Bieri, dated January 5, 2006. Both parties referenced this report in their briefs to the Board and neither argued that the report should properly be excluded. Thus, the Board will consider this report part of the record.

ISSUES

The only issue for purposes of appeal is the nature and extent of claimant's permanent impairment resulting from an October 15, 2003 compensable accident. The ALJ relied exclusively on the opinions expressed by the independent medical examiner, Dr. Peter V. Bieri, who found claimant had a 11 percent functional impairment to the body

as a whole for his bilateral knee condition.¹ This finding was made based solely upon Dr. Bieri's initial report dated November 14, 2005, and does not take into consideration the claimant's alleged pre-existing impairment to his left knee.

The respondent requests review of this decision alleging the ALJ failed to take into consideration Dr. Bieri's supplemental report dated January 5, 2006, which purported to reduce his overall 11 percent finding to 9 percent to the whole body, taking into account claimant's alleged pre-existing impairment to his left knee. Thus, respondent contends the ALJ's Award should be reduced to 9 percent.

Claimant argues the ALJ's Award should be increased to 15 percent to the body as a whole based upon the opinions of Dr. James H. Whitaker, the physician who, according to claimant, appropriately examined him and rendered an opinion consistent with the principles set forth in the 4th edition of the *Guides*.² Claimant maintains Dr. Bieri's examination was not done in a manner consistent with the requisites set forth in the *Guides* and should therefore be wholly disregarded. Moreover, claimant suggests that neither physician appropriately addressed the issue of pre-existing impairment as required by *Hanson*³. Thus, respondent is not entitled to a credit for any pre-existing impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant has a history of problems with his left knee dating at least as far back as February 2000. At that time, he was experiencing occasional sharp pains and "lots of noise" in his left knee.⁴ He made a workers compensation claim and was provided with treatment, including surgery. Claimant was released to return to work with no restrictions and testified that his left knee was much better following surgery.⁵

Claimant testified that he received a settlement for that claim although the specifics of that settlement are not contained within the record.

¹ ALJ Award (May 3, 2006) at 2.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

³ *Hanson v. Logan*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

⁴ R.H. Trans. at 11.

⁵ *Id.* at 13.

In late summer of 2001, claimant began to notice changes in both his knees while he was doing a lot of stair and ladder climbing for his job. His left knee progressively got worse and as a result, he favored the knee, placing more weight on his right knee. The parties agree that claimant sustained a compensable injury to both his knees culminating on October 15, 2003. Claimant was again provided treatment with a series of practitioners and, in October 2004, his left knee was arthroscopically treated. Unlike his first experience, claimant did not have a good result from this procedure and he has declined any further surgical suggestions for his right knee. Claimant continues to work for respondent although he does so with significant pain and requires assistance to continue his regular work duties.

At his counsel's request, claimant was examined by Dr. James H. Whitaker on May 2, 2005. Dr. Whitaker diagnosed bilateral lower extremity genuvalgus (knock-kneed) with increased quadriceps angle in conjunction with profound patellofemoral joint arthritis and moderate tibiofemoral arthritis.⁶ Dr. Whitaker also noted claimant's operative incision from the 2000 surgery which involved an osteotomy of the tibial tubercle along with the bilateral retropatellar crepitus and diffuse moderate tri-compartmental arthritis bilaterally, which he observed on x-rays taken in his office. Dr. Whitaker ultimately assigned a 20 percent permanent partial impairment to each lower extremity.

When asked to explain his permanent impairment, Dr. Whitaker indicated he rated claimant's impairment based, in part, upon the cartilage interval remaining in claimant's knee. In this instance, claimant has essentially no cartilage left in either of his knees (as evidenced by the x-rays) and based upon Table 62, Page 83 of the *AMA Guides*, the resulting impairment is 20 percent to each lower extremity. However, Dr. Whitaker testified that he not only considered the x-ray changes in claimant's knees, but also considered the weakness in claimant's knees which he judged to be moderate to marked during the examination as well as the malalignment and function problems claimant has resulting from his knock-kneed condition (which Dr. Whitaker contends was aggravated by claimant's work activities). When all these factors were considered, Dr. Whitaker concluded the 20 percent permanent impairment to each knee was appropriate.

When asked to combine these ratings in the method prescribed by the *Guides*, Dr. Whitaker erroneously concluded the 20 percent to each of the lower extremities combined to be a 10 or 12 percent to the whole body. Claimant concedes Dr. Whitaker was incorrect in this aspect of his testimony and offered Table 62 of the *Guides* to illustrate the proper conversion of a 20 percent lower extremity to an 8 percent whole body impairment. Similarly, the 8 percent whole body impairment for each lower extremity, when properly combined, results in a 15 percent permanent impairment to the whole body.⁷ In a

⁶ Whitaker Depo., Ex. 2 at 1.

⁷ Claimant's Brief at 5 (filed June 9, 2006).

subsequent letter, Dr. Whitaker opined that “80% of these impairment ratings are directly related to his job as a plumber.”⁸

When the parties could not agree upon claimant’s permanent impairment, the ALJ appointed Dr. Peter Bieri to conduct an independent medical examination pursuant to K.S.A. 44-510e(a). Dr. Bieri examined claimant and generated a report dated November 14, 2005. According to this report, Dr. Bieri reviewed a significant number of medical records relating to his knee complaints, including those from 2000, but no x-rays. Like Dr. Whitaker, Dr. Bieri diagnosed moderate to severe bilateral patellofemoral arthritis. He also diagnosed a left medial meniscal tear as confirmed by “[r]adiographic findings”.⁹

Dr. Bieri rendered an opinion as to claimant’s permanent impairment as follows: 15 percent to the left lower extremity for patellofemoral arthritis, 2 percent to the left lower extremity for residuals of partial medial meniscectomy, and 10 percent to the right lower extremity for residuals of patellofemoral arthritis. The left lower extremity, when combined, yields a 17 percent which when converted, yields a 7 percent whole person permanent impairment. The right lower extremity when converted, yields a 4 percent whole person impairment and the two, when combined, yields an 11 percent permanent impairment to the body as a whole.

Sometime thereafter, a follow-up report was issued. This second report, dated January 5, 2006, was addressed to respondent’s counsel, not the ALJ, although both the ALJ and claimant’s counsel were provided with a copy. The second report came in response to a request by respondent’s counsel and acknowledges that Dr. Bieri failed to speak to the issue of “apportionment”.¹⁰ He goes on to indicate that he agrees “with Dr. Whitaker that twenty percent (20) of the impairment was pre-existing, and of the combined whole-person impairment of eleven percent (11%), this would translate to two percent (2%) whole-person impairment as pre-existing, and nine percent (9%) whole-person impairment attributable to injury as reported.”¹¹

The ALJ noted both physicians’ opinions by stating the following:

...Two doctors, Whitaker and Bieri, entered opinions of functional impairment. Dr. Whitaker opined claimant had a 20 percent impairment to each lower extremity. However, he was unsure what 20 percent converted to as a percentage of impairment to the whole person, other than to note that he thought it was between 10 and 12 percent. Table 41 at p. 78 in the *AMA Guides [to] the Evaluation of*

⁸ Whitaker Depo., Ex 2 at 3(Letter dated July 13, 2005).

⁹ Dr. Bieri’s November 14, 2005 IME Report at 5.

¹⁰ Respondent’s Submission Letter (filed Apr. 28, 2006), (Dr. Bieri’s addendum, dated Jan. 5, 2006),

¹¹ *Id.*

Permanent Impairment 4th Edition would indicate a 20 percent lower extremity impairment converts to 8 percent body as a whole for each lower extremity, which would equate to a 15 percent body as a whole impairment.

However, the court is unsure to what extent the doctor relied upon that table to arrive at his rating. He cited a number of factors that figured into his rating and in his report stated, "... 80% of these impairment ratings are directly related to his job as a plumber." The court is uncertain whether the doctor is stating claimant had a preexisting impairment in both knees. The only discussion of any potential preexisting impairment was a failed operation to claimant's left knee.

Chiefly because of the uncertainty of Dr. Whitaker's assessment, the court will rely exclusively on the report of its independent medical examiner, Dr. Bieri, who found claimant had a 11 percent functional impairment to the body as a whole.¹²

Unfortunately, the ALJ made no comment as to the follow-up opinions expressed by Dr. Bieri wherein he purported to decrease his impairment rating based upon a 20 percent preexisting impairment. But it seems, based upon the ALJ's comments above, that the ALJ was unpersuaded by the evidence as it related to any alleged preexisting impairment. And the Board is equally unpersuaded.

Dr. Whitaker seemed to think that only 80 percent of claimant's work activities were the source of claimant's bilateral knee condition. Yet, contribution is not the definitive question. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.¹³ The test is not whether the job-related activity or injury caused the condition, but whether the job-related activity or injury aggravated or accelerated the condition.¹⁴ Here, both physicians and respondent agree claimant's work activities aggravated and/or accelerated his arthritic condition. Thus, he is entitled to compensation for his resulting permanency.

However, K.S.A. 1996 Supp. 44-501(c) provides: "[t]he employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting." Thus, the operative question in this claim is how much of claimant's knee impairment preexisted his

¹² ALJ Award (May 3, 2006) at 2.

¹³ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

¹⁴ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

accident. The Kansas Court of Appeals in *Hanson*¹⁵, addressed the foregoing statute, distinguishing between a preexisting condition and a preexisting disability. In *Hanson*, the Court noted there was no evidence of the amount of Hanson's preexisting disability, while there was some evidence Hanson had a preexisting condition.

Here, just like in *Hanson*, there is some suggestion that claimant had problems in his left knee, even filed a claim and received treatment and ultimately a settlement. However, the extent of that settlement or an opinion as to the extent of his preexisting impairment is wholly absent from this record. As noted by the ALJ, Dr. Whitaker vaguely commented on the contribution aspect of claimant's work activities towards his present condition, but did not make it clear that he was speaking as to one knee or both. Given this uncertainty, the ALJ elected to disregard Dr. Whitaker's opinions altogether and adopt those expressed by Dr. Bieri. And in an effort to be consistent, the ALJ properly disregarded Dr. Bieri's subsequent opinion (based upon Dr. Whitaker's report) that 20 percent of his assigned impairment rating preexisted claimant's most recent claim.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 3, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Carrier

¹⁵ *Hanson*, supra.